

## DEPARTMENT OF STATE REVENUE

04-20170815.MOD

**Memorandum of Decision: 04-20170815  
Sales Tax and Withholding Tax  
For Tax Year 2016**

**NOTICE:** IC § 4-22-7-7 permits the publication of this document in the Indiana Register. The publication of this document provides the general public with information about the Indiana Department of Revenue's official position concerning a specific set of facts and issues. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Memorandum of Decision.

**HOLDING**

Business had not filed sales tax and withholding tax returns which resulted in estimated billings for those taxes. Business provided sufficient documentation to establish that sales tax and withholding tax at issue was not due. Refund of these estimated amounts is warranted. Refund of collection fees is not warranted.

**ISSUE**

**I. Sales Tax and Withholding Tax—Refund.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-5-8; IC § 6-3-4-8; IC § 6-8.1-9-1; IC § 6-8.1-8-2; IC § 6-8.1-8-4; *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); [45 IAC 3.1-1-97](#).

Taxpayer protests the denial of a claim for refund.

**STATEMENT OF FACTS**

Taxpayer is an Indiana business. Taxpayer filed a claim for refund of amounts levied from its bank account by a third-party collection agency on behalf of the Indiana Department of Revenue ("Department") regarding sales tax and withholding tax for the tax year 2016. After review, Department denied the claim on the basis that Taxpayer had not supplied sufficient documentation to grant the claimed refund. Taxpayer protested the denial of the claim for refund. An administrative hearing was held and this Memorandum of Decision results. Further facts will be supplied as required.

**I. Sales Tax and Withholding Tax—Refund.**

**DISCUSSION**

Taxpayer protests the denial of a claim for refund of sales tax and withholding tax for the tax year 2016. The Department based its proposed assessments for sales tax and for withholding tax on Taxpayer's failure to file returns for those taxes for 2016. When Taxpayer did not respond to the proposed assessments, the Department issued demand notices. When Taxpayer did not respond to the demand notices, the Department filed tax warrants with the county clerk in Taxpayer's home county. At that point, the matter was referred to a third-party collection agency which levied Taxpayer's bank account for the amount of the base taxes, penalties, interest, and collection fees. Taxpayer filed a claim for refund of the amount levied from its bank account. The Department denied the claim for refund on the grounds that Taxpayer did not provide the documentation required to verify its claim.

As an initial point, the Department notes that, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the initial refund determination, shall be entitled to deference.

Sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) *The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction.* The retail merchant shall collect the tax as agent for the state.

*(Emphasis added).*

Next, IC § 6-2.5-5-8(b) provides:

Transactions involving tangible personal property other than a new motor vehicle are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business without changing the form of the property.

IC § 6-3-4-8 provides, in part, as follows:

(a) Except as provided in subsection (d), every employer making payments of wages subject to tax under this article, regardless of the place where such payment is made, who is required under the provisions of the Internal Revenue Code to withhold, collect, and pay over income tax on wages paid by such employer to such employee, shall, at the time of payment of such wages, deduct and retain therefrom the amount prescribed in withholding instructions issued by the department. The department shall base its withholding instructions on the adjusted gross income tax rate for persons, on the total rates of any income taxes that the taxpayer is subject to under [IC 6-3.5](#), and on the total amount of exclusions the taxpayer is entitled to under [IC 6-3-1-3.5\(a\)\(3\)](#) and [IC 6-3-1-3.5\(a\)\(4\)](#). However, the withholding instructions on the adjusted gross income of a nonresident alien (as defined in Section 7701 of the Internal Revenue Code) are to be based on applying not more than one (1) withholding exclusion, regardless of the total number of exclusions that [IC 6-3-1-3.5\(a\)\(3\)](#) and [IC 6-3-1-3.5\(a\)\(4\)](#) permit the taxpayer to apply on the taxpayer's final return for the taxable year. Such employer making payments of any wages:

- (1) shall be liable to the state of Indiana for the payment of the tax required to be deducted and withheld under this section and shall not be liable to any individual for the amount deducted from the individual's wages and paid over in compliance or intended compliance with this section; and
- (2) shall make return of and payment to the department monthly of the amount of tax which under this article and [IC 6-3.5](#) the employer is required to withhold.

The relevant regulation, [45 IAC 3.1-1-97](#), states that employers must "withhold [F]ederal taxes pursuant to the Internal Revenue Code," and are also "required to withhold from employees' wages Adjusted Gross and County Adjusted Gross Income Tax."

Next, IC § 6-8.1-9-1(a) provides:

If a person has paid more tax than the person determines is legally due for a particular taxable period, the person may file a claim for a refund with the department. Except as provided in subsections (f) and (g), in order to obtain the refund, the person must file the claim with the department within three (3) years after the latter of the following:

- (1) The due date of the return.
- (2) The date of payment.

For purposes of this section, the due date for a return filed for the state gross retail or use tax, the gasoline tax, the special fuel tax, the motor carrier fuel tax, the oil inspection fee, or the petroleum severance tax is the end of the calendar year which contains the taxable period for which the return is filed. The claim must set forth the amount of the refund to which the person is entitled and the reasons that the person is entitled to the refund.

Therefore, if a person has paid more tax than he or she believes was properly due, the person may claim a refund of the excess payment. In this case, Taxpayer claimed that it was entitled to a refund of both the sales tax and the withholding tax levied from its bank account.

At the hearing, Taxpayer explained that in 2009 it had ceased operations as a prior entity and had reincorporated as the current entity. Along with the reincorporation came a change in its basic operations. The current entity has never had employees to whom it paid wages. Therefore, it had no withholding duties. In addition, Taxpayer stated that the current entity provides services only, in contrast to the prior entity which sold and installed tangible personal property. Since sales tax is only imposed on the sale of tangible personal property and since Taxpayer did not sell tangible personal property, there were no sales tax collection duties. Therefore, Taxpayer has established that it did not owe the base amounts of sales tax and withholding tax, penalties, and interest which was assessed and levied from its bank account. The Department also takes this opportunity to inform Taxpayer that it should file BC-100 business closure forms if any accounts for the prior entity remain open. This will prevent this issue from arising in the future.

Regarding the amounts of collection fees which were levied from Taxpayer's bank account, if the Department reasonably believes that a "taxpayer has not reported the proper amount of tax due," the Department shall propose an assessment of unpaid tax based on "the best information available to the Department". IC § 6-8.1-5-1(b). The amount of the proposed assessment "is considered a tax payment not made by the due date" and is subject to penalties and interest. *Id.* Notice of the proposed assessment shall be sent to the taxpayer stating that it has sixty (60) days in which to pay the assessment or file a written protest. IC § 6-8.1-5-1(b) and (d). If the taxpayer does not pay the proposed assessment or file a written protest in the sixty (60) day period "[t]he department shall demand payment, as provided in [IC 6-8.1-8-2\(a\)](#), of any part of the proposed tax assessment, interest, and penalties . . . ." IC § 6-8.1-5-1(j). In these situations, the Department "shall make the demand for payment in the manner provided in [IC 6-8.1-8-2](#)." IC § 6-8.1-5-1(k).

IC § 6-8.1-8-2 provides that the Department must issue a demand notice for payment which grants the taxpayer a twenty (20) day period of time in which to "either pay the amount demanded or show reasonable cause for not paying the amount demanded." IC § 6-8.1-8-2(a)(1). If a taxpayer "does not pay the amount demanded or show reasonable cause for not paying the amount demanded within the twenty (20) day period, the department may issue a tax warrant for the amount of the tax, interest, penalties, collection fee, sheriff's costs, clerk's costs," and other fees. IC § 6-8.1-8-2(b). When it has issued a tax warrant, the Department may contract with a collection agency to collect delinquent tax plus interest, penalties, collection fees, and other fees and costs. IC § 6-8.1-8-4(a). Additionally, "a collection fee of ten percent (10 percent) of the unpaid tax is added to the total amount due." *Id.* When a tax warrant is filed, "the total amount of the tax warrant becomes a judgment against the person owing the tax." IC § 6-8.1-8-2(e).

In this case, the Department properly notified Taxpayer, but Taxpayer did not respond to the Department's proposed assessment notice or the Department's demand notice. IC § 6-8.1-8-2(b) authorizes a collection fee of ten percent whenever the Department issues a tax warrant. In addition, IC § 6-8.1-8-4(a) and (b) authorize fees for collection agencies acting on the Department's behalf. The collection fees in question are the result of an assessment which advanced to a tax warrant stage. The collection fees are a statutorily allowed amount for collection on a tax warrant, even if the tax liability is later shown to be in error. Further, Taxpayer has not demonstrated that the Department acted improperly at any stage of the collections process and the Department does not refund collection fees unless the Taxpayer can prove that the Department was somehow at fault. Taxpayer failed to do so in this case.

In this case the Department mailed multiple notices to Taxpayer's address listed on the Department's records. Taxpayer did not respond to those notices. The Department followed statutory procedure each step of the way. While the Agency retained a portion of the amount paid by Taxpayer as a result of completing its collection effort, the Department refunded Taxpayer the money which the Department received. The collection fees were not retained by the Department and, therefore, in the absence of Department error, the Department is not able to refund the collection fees.

In conclusion, Taxpayer has provided sufficient documentation and analysis to establish that it did not owe the sales tax, withholding tax, penalties, and interest which was levied from its bank account. Those amounts will be refunded to Taxpayer. However, Taxpayer did not respond to the Department's proposed assessments and demand notices thereby necessitating the employment of the third-party collection agency. The amount of collection fees will not be refunded to Taxpayer.

## FINDING

Taxpayer's protest is sustained in part and denied in part, as provided above.

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